



BOARD OF EQUALIZATION

BUSINESS TAXES COMMITTEE MEETING MINUTES

HONORABLE JOHN CHIANG, COMMITTEE CHAIR

450 N STREET, SACRAMENTO

MEETING DATE: FEBRUARY 5, 2002, TIME: 9:30 A.M.

ACTION ITEMS & STATUS REPORT ITEMS

Agenda Item No: 1

Title: Proposed regulation regarding process for reviewing local tax reallocation inquiries, Regulation 1807, *Process for Reviewing Local Tax Reallocation Inquiries*.

Issue/Topic:

Should Regulation 1807, *Process for Reviewing Local Tax Reallocation Inquiries*, be adopted?

Committee Discussion:

One interested party addressed the Committee regarding Action Items 1, 2, 3, and 5.

Action 1, Consent Items

The Committee Chair approved the interested party's request to remove the following items from the consent agenda:

Subdivision 1807(a)(2): Delete the first clause in the first sentence that reads "Except for submittals under Revenue and Taxation Code section 6066.3." This was discussed under Action 5.

Subdivision 1807(a)(3): Delete the final clause in the first sentence that reads "unless an earlier such date is operationally documented by the Board." This was discussed under Action 5.

Subdivision 1807(d)(1): Delete the last clause, which states "through the Local Tax Appeals Auditor level." Staff briefly discussed whether the 30 day extension of the time limit established for each level of review through the Local Tax Appeals Auditor level should be extended to review at the Board Member's level.

There was no additional discussion of the consent items.

Action 2, Minimum factual data necessary to establish a date of knowledge, subdivision (a)(2)(E)

The interested party explained that the language under this subdivision should be stricken as it involves various cases currently under consideration by Board Management, and therefore, this language deprives other cities of administrative remedy. The cities should not be required to provide evidence that title passed in California in order for the inquiry to establish date of knowledge. Staff stated that for an inquiry to establish date of knowledge it must contain sufficient factual information to show not just the possibility but the probability that a misallocation of local tax has occurred. Further, staff stated that in cases involving shipments from an out-of-state location and claims that the tax is sales tax and not use tax, as provided under Regulation 1620, evidence must be submitted that there was participation by an in-state office of the out-of-state retailer and that title to the goods passed in this state.

Action 3, The Hearing by Board Members, subdivisions (c)(5)(B)1. and (c)(5)(B)2.

In response to an inquiry from the Committee, staff clarified the current process for review by the Board Members. The Committee discussed Committee Member Andal's proposal to eliminate the current double hearing process. Committee Member Johan Klehs proposed an alternative regarding the hearing by the Board Members whereby all cases reviewed by Board Management would be placed on a consent calendar for approval by the Board. Thus, if the Board wishes to hear a particular case, they may remove it from the consent calendar and schedule it for a hearing.

Action 4, Regulations Governing Hearings, subdivision (c)(5)(B)2.

There was no discussion of this item.

Action 5, Section 6066.3 Inquiries, subdivision (g)(1)

The interested party expressed concern regarding the possibility of conflicts between the provisions of the Memorandum of Understanding (MOU) established pursuant to AB 990 and the provisions of the proposed Regulation 1807. He wanted to clarify that if *equivalent inquiries or claims containing substantially the same reasons for error as another claim or inquiry* regarding suspected improper distribution of local tax are received both under the procedures set forth in Regulation 1807 and the MOU, duplicate submissions will not be processed. He was concerned that, for example, a simple registration inquiry received under the MOU procedures would cause a more complex issue submitted under Regulation 1807 to be disregarded, simply because the MOU inquiry was received first. Staff explained that if separate inquiries are submitted under the MOU and the provisions of the proposed Regulation 1807 the date of the earliest submission shall be controlling, and the date of knowledge shall be established under the controlling procedure. Investigation would then proceed using all available information.

Action 6, Authorization to Publish

There was no discussion of this item.

Committee Action/Recommendation/Direction:Action 1, Consent

The Committee approved all consent items (as amended).

In regard to items removed from the consent agenda:

Subdivision 1807(a)(2): See Action 5.

Subdivision 1807(a)(3): See Action 5.

Subdivision 1807(d)(1): Consideration of this item was postponed until the March 26, 2002 Business Taxes Committee meeting.

Action 2, Minimum Factual Data Necessary to Establish a Date of Knowledge, subdivision (a)(2)(E)

The Committee approved a motion to adopt regulatory language as proposed by staff.

Action 3, The Hearing by Board Members, subdivisions (c)(5)(B)1. and (c)(5)(B)2

The Committee postponed consideration of this item until the March 26, 2001 Business Taxes Committee meeting. Staff was directed to redraft this and any other affected subdivisions to reflect Mr. Klehs proposal to place all cases reviewed by Board Management on the consent calendar for approval by the Board.

Action 4, Regulations Governing Hearings, subdivision (c)(5)(B)2

The Committee approved a motion to adopt regulatory language as proposed by staff.

Action 5, Section 6066.3 Inquiries, subdivision (g)(1)

The Committee approved a motion to adopt regulatory language as proposed by staff.

Action 6, Authorization to Publish

The Committee postponed consideration of this item until the March 26, 2001 Business Taxes Committee meeting.

Agenda Item No: 2

Title: Proposed regulatory changes regarding application of tax to graphic arts and related enterprises (Regulations 1540, 1541, 1543 and 1528)

Issue/Topic:

Should Regulations 1540, 1541, 1543 and 1528 be amended to clarify the application of tax to graphic arts and related enterprises?

Committee Discussion:

Agenda A, Regulation 1543, Publishers

Agenda A, Action 1, Consent Items

There was no discussion of this item.

Agenda A, Action 2, Authorization to Publish

There was no discussion of this item.

Agenda B, Regulation 1528, Photographers, Photocopiers, Photo Finishers and X-Ray Laboratories

Agenda B, Action 1, Consent Items

There was no discussion of this item.

Agenda B, Action 2, Authorization to Publish

There was no discussion of this item.

Agenda C, Regulation 1541, Printing and Related Arts

Agenda C, Action 1, Consent Items

There was no discussion of this item.

Agenda C, Action 2, Special Printing Aids

There was no discussion of this item.

Agenda C, Action 3, Authorization to Publish

There was no discussion of this item.

Agenda D, Regulation 1540, Advertising Agencies, Commercial Artists and Designers**Agenda A, Action 1, Consent Items**

This action also includes the following previous nonconsent actions:

- Action 2, Organization of the Regulation
- Action 5, Definition of Finished Art
- Action 8, Application of Tax to Services [(b)(1)(A)2.]
- Action 9a, Specific Nontaxable Charges, Fees and Commissions Considered Markup
- Action 10, Use of Aids in Creation of Finished Art – Title Clause Agreement
- Action 12, Transfers of Finished Art in Tangible Form – Option to Separately State
Special Printing Aids
- Action 18, Explanation of Calculation of Sales Price of Other Tangible Personal Property
- Action 19, Evidence to Prove Erroneous Issuance of Resale Certificate
- Action 20, Invoice to Client for More Than cost of Property
- Action 21b, Items Produced In-House – Defining the Term “Incorporated”

There was no discussion of this item.

Agenda D, Action 3, New Clarifying Language Proposed by Staff

This action also includes the following previous nonconsent actions:

- Action 4, Definition of Contract of Sale
- Action 6, Definition of Intermediate Production Aids
- Action 7, Definition of Preliminary Art
- Action 8, Application of Tax to Services [(b)(1)(A)1.]
- Action 11, Transfers of Finished Art in Tangible Form – Cost of Special Printing Aids

There was no discussion of this item.

Agenda D, Action 9b, Specific Nontaxable Charges – Agent Fees

An interested party presented its argument that the agent fee language should not be removed from subdivision (b)(1)(F) since it provides more clarity to the application of tax to agent fees. Staff indicated that the application of tax to agent fees was properly addressed in subdivision (c)(1)(B).

Agenda D, Action 13, Technology Transfer Agreement – Requirement That if Be in Writing

There was no discussion of this item.

Agenda D, Action 14, Technology Transfer Agreement – Finished Art Transferred on Computer Storage Media

An interested party presented its position that temporary transfers of finished art on a storage media that is returned should be treated as a transfer incidental to the sale of an intangible, since the media has a de minimis value. Staff indicated that the technology transfer agreement statute explicitly provides for the calculation of the cost of finished art in technology transfer agreements as was noted in the *Preston* case.

Agenda D, Action 15, Technology Transfer Agreement – Separately Stated Price and Action 21a, Technology Transfer Agreement – Separately Stated Sales Price “Fair Market Value” vs. “Reasonable”

Interested parties presented a combined proposal to include language that would incorporate a reference to the lease of finished art for a separately stated lease price, into staff's proposed language regarding separately stated sales price. Interested parties suggested that the separately stated sales price should be “reasonable” and not “fair market value” since the statute refers to a “reasonable” value. Staff indicated that “sales price” includes both a sale and a lease and that no further clarifying language is necessary. In addition, fair market value is a valid regulatory interpretation and provides better guidance than the term “reasonable.”

Agenda D, Action 16, Technology Transfer Agreement – The Value of the Artist's Labor

An interested party indicated that “cost” has no meaning unless there is an objective verifiable cost measured by purchases from a third party or an employee. Staff presented its position that the calculation of the measure of tax on the sale of tangible personal property should be the same no matter which method of calculation is used.

Agenda D, Action 17, Cost of Materials – Includes Those Used as well as Incorporated

There was no discussion of this item.

Committee Action/Recommendation/Direction:***Agenda A, Regulation 1543, Publishers***Action 1, Consent Items

The Committee approved all consent items.

Action 2, Authorization to Publish

The Committee recommended that the Board authorize publication of the amendments to Regulation 1543, as adopted by the above action. There is no operative date, and implementation will take place 30 days after approval by the Office of Administrative Law. A copy of the proposed regulation is attached. In order to conform and make consistent the definition of preliminary art authorized for publication for Regulation 1540, subdivision 1543(a)(8) has been amended as indicated.

Agenda B, Regulation 1528, Photographers, Photocopiers, Photo Finishers and X-Ray LaboratoriesAgenda B, Action 1, Consent Items

The Committee approved all consent items.

Agenda B, Action 2, Authorization to Publish

The Committee recommended that the Board authorize publication of the amendments to Regulation 1528, as adopted by the above action. There is no operative date, and implementation will take place 30 days after approval by the Office of Administrative Law. A copy of the proposed regulation is attached.

Agenda C, Regulation 1541, Printing and Related ArtsAgenda C, Action 1, Consent Items

The Committee approved all consent items.

Agenda C, Action 2, Special Printing Aids

The Committee approved a motion to adopt staff's proposed regulatory language.

Agenda C, Action 3, Authorization to Publish

The Committee recommended that the Board authorize publication of the amendments to Regulation 1541, as adopted by the above actions. There is no operative date, and implementation will take place 30 days after approval by the Office of Administrative Law. A copy of the proposed regulation is attached. In order to conform and make consistent the definition of intermediate production aids authorized for publication for Regulation 1540, subdivision 1541(a)(6) has been amended as indicated.

Agenda D, Regulation 1540, Advertising Agencies, Commercial Artists and DesignersAgenda A, Action 1, Consent Items

The Committee approved all consent items.

Agenda D, Action 3, New Clarifying Language Proposed by Staff

The Committee approved a motion to adopt staff's proposed regulatory language.

Agenda D, Action 9b, Specific Nontaxable Charges – Agent Fees

The Committee approved a motion to adopt staff's proposed regulatory language.

Agenda D, Action 13, Technology Transfer Agreement – Requirement That it Be in Writing

The Committee approved a motion to adopt staff's proposed regulatory language.

Agenda D, Action 14, Technology Transfer Agreement – Finished Art Transferred on Computer Storage Media

The Committee approved a motion to adopt the interested party's proposed regulatory language.

Agenda D, Action 15, Technology Transfer Agreement – Separately Stated Price and
Action 21a, Technology Transfer Agreement – Separately Stated Sales Price “Fair
Market Value” vs. “Reasonable”

The Committee approved a motion to adopt the proposed regulatory language presented by interested parties at the Committee meeting.

Agenda D, Action 16, Technology Transfer Agreement – The Value of the Artist's Labor

The Committee approved a motion to adopt the Guild's proposed regulatory language that “labor,” for purposes of determining the cost of labor, is labor purchased from a third party or when the work is performed by an employee.

Agenda D, Action 17, Cost of Materials – Includes Those Used as well as Incorporated

The Committee approved a motion to adopt staff's proposed regulatory language.

Agenda D, Action 22, Authorization to Publish

The Committee recommended that the Board authorize publication of the amendments to Regulation 1540, as adopted by the above action. There is no operative date, and implementation will take place 30 days after approval by the Office of Administrative Law. A copy of the proposed regulation is attached.

Approved: /s/John Chiang
John Chiang, Committee Chair

/s/James E. Speed
James E. Speed, Executive Director

BOARD APPROVED
at the February 6, 2002 Board Meeting

/s/Deborah Pellegrini
Deborah Pellegrini, Chief
Board Proceedings Division

Regulation 1543. PUBLISHERS.

Reference: Sections 6006, ~~6007~~, ~~6010~~, ~~6010.3~~, ~~6011~~, ~~6012~~, ~~6015~~, 6094, 6244, 6362, 6379.5 and 6396, Revenue and Taxation Code.

(a) DEFINITIONS.

~~—(1) AUTHOR. Author means and includes any person who creates an original manuscript for the purpose of publication. For purposes of this regulation, the following persons are also authors:~~

~~—(A) Developmental Editors. A developmental editor means and includes any person who consults with an author (as defined above) to develop the concepts in a manuscript or reviews the copy edited manuscript and recommends visual concepts.~~

~~—(B) Copy Editors. A copy editor means and includes any person who reviews a manuscript for grammatical consistency and clarity.~~

~~—(C) Manuscript Reviewers. A manuscript reviewer means and includes any person who reviews a manuscript for technical accuracy and acceptability to the proposed audience. For example, a reviewer may review the manuscript of a book on gardening for technical accuracy and suitability of the gardening advice for a particular climate.~~

~~—(D) Photo researchers. A photo researcher means and includes any person who assists other authors or publishers in obtaining permission and rights from third parties to use photographic images to illustrate a manuscript.~~

~~—(E) Translators. A translator means and includes any person who produces a manuscript that is a translation of material from a different language.~~

~~—(2) DESIGNER. Designer means and includes any person who plans and prepares a general layout of typographical and illustrative elements for printed literature.~~

~~—(3) ART DIRECTOR. Art Director means and includes any person who prepares general specifications (in the form of verbal instructions or rough sketches) for an illustrator or photographer.~~

~~—(4) PRODUCTION FUNCTION. A production function is a segment of the process of producing camera-ready art or camera-ready copy, and includes but is not limited to the following:~~

~~—(A) Manuscript Mark-Up: The application of type specifications to a manuscript for typesetting, when done manually.~~

The proposed amendments contained in this document may not be adopted. Any revisions that are adopted may differ from this text.

~~—(B) **Formatting:** Manuscript mark-up, when done electronically.~~

~~—(C) **Typesetting, Typography or Composition:** Composition of type by any method, within the meaning of Revenue and Taxation Code section 6010.3.~~

~~—(D) **Proofreading:** A reading of typeset copy for correctness in comparison with the original manuscript.~~

~~—(E) **Alterations:** Changes made to typeset copy or camera-ready copy.~~

~~—(F) **Dummy:** A mock-up or layout of a page showing position and overall form, used for approval. A dummy can be assembled manually or generated by a computer program. A dummy is never incorporated physically into a mechanical or paste-up.~~

~~—(G) **Mechanical or Paste-up:** Reproduction (“repro”) copy, both text and illustrative material, that is ready to be photographed and made into lithographer's film. Also referred to as camera-ready art or camera-ready copy.~~

~~—(H) **Production Coordination or Production Direction:** Coordination and scheduling of the various components of a project.~~

~~—(I) **Production Editing:** Maintaining editorial integrity of the author's work during the production process.~~

~~—(5) **PUBLISHER:** Publisher means and includes any person who owns the rights to reproduce, market and distribute printed literature.~~

~~—(6) **PRELIMINARY ART:** Preliminary art means roughs, visualizations, layouts and comprehensives, title to which does not pass to the client, but which are prepared solely for the purpose of demonstrating an idea or message for acceptance by the client before a contract is entered into or before approval is given for preparation of finished art to be furnished by the seller to his or her client.~~

~~—(7) **FINISHED ART:** Finished art means the final art used for actual reproduction by photo-mechanical or other processes.~~

~~—(8) **PHOTOSTAT:** Photostat means a copy produced by photographic means, often used in layout, dummy work, or “for position only” on camera-ready art.~~

~~—(9) **SYNDICATORS:** The term syndicator means and includes any person who receives original manuscripts or reproduction proofs thereof, including columns, cartoons, and comic strip drawings, from authors and distributes those manuscripts to publishers for publication.~~

The proposed amendments contained in this document may not be adopted. Any revisions that are adopted may differ from this text.

(1) ART DIRECTOR. An art director prepares general specifications (in the form of verbal instructions or rough sketches) for an illustrator or photographer.

(2) AUTHOR. An author creates an original manuscript, whether written by hand, on a typewriter or computer, or otherwise, for the purpose of publication. For purposes of this regulation, the following persons are also authors:

(A) Copy editor, who reviews a manuscript for grammatical consistency and clarity.

(B) Developmental editor, who consults with the author who created an original manuscript for purposes of publication to develop the concepts in the manuscript, or who reviews the copy edited manuscript and recommends visual concepts.

(C) Manuscript reviewer, who reviews a manuscript for technical accuracy and acceptability to the proposed audience. For example, a reviewer may review the manuscript of a book on gardening for technical accuracy and suitability of the gardening advice for a particular climate.

(D) Photo researcher, who assists other authors or publishers in obtaining permission and rights from third parties to use photographic images for purposes of reproduction in the publication of a manuscript.

(E) Translator, who produces a manuscript that is a translation of material from a different language.

(3) DESIGNER. A designer plans and prepares a general layout of typographical and illustrative elements for printed literature.

(4) FINISHED ART. Finished art is the final artwork used for actual reproduction by photomechanical or other processes, or used for display. It includes electronic art, illustrations (e.g. drawings, diagrams, halftones, or color images), photographic images, sculptures, paintings, and handlettering.

(5) ILLUSTRATOR. An illustrator creates an illustration, which is an original artwork (including cartoons and comic strips) licensed for the purpose of publication.

(6) PHOTOGRAPHER. A photographer creates an original photographic image through the use of a camera or similar device, which photographic image is licensed for the purpose of publication.

(7) PHOTOSTAT. A photostat (also called a “stat”) is a copy produced by photographic means, often used in layout, dummy work, or “for position only” on camera-ready art.

The proposed amendments contained in this document may not be adopted. Any revisions that are adopted may differ from this text.

(8) PRELIMINARY ART. Preliminary art is tangible personal property which is prepared solely for the purpose of demonstrating an idea or message for acceptance by the client before a contract is entered into, or before approval is given, for preparation of finished art to be furnished or licensed by the seller to his or her client, provided neither title to, nor permanent possession of, such tangible personal property passes to the client. Examples of preliminary art may include roughs, visualizations, layouts, comprehensives, and instant photos.

(9) PRODUCTION FUNCTION. A production function is a segment of the process of producing camera-ready art or camera-ready copy, and includes the following:

(A) Alterations, which are changes made to typeset copy or camera-ready copy.

(B) Dummy, which is a mock-up or layout of a page showing position and overall form, used for approval. A dummy can be assembled manually or generated by a computer program. A dummy is never physically incorporated into a mechanical or paste-up.

(C) Formatting, which is a manuscript mark-up, when done electronically.

(D) Manuscript mark-up, which is the application of type specifications to a manuscript for typesetting, when done manually.

(E) Mechanical or paste-up (also called camera-ready art or camera-ready copy), which is produced by preparing copy to make it camera-ready with all type and design elements, and then pasting the prepared copy on artboard or illustration board in exact position along with instructions, either in the margins or on an overlay, for the platemaker.

(F) Production Coordination or Production Direction, which is the coordination and scheduling of the various components of a project.

(G) Production Editing, which is editing that maintains editorial integrity of the author's work during the production process.

(H) Proofreading, which is a reading of typeset copy for correctness in comparison with the original manuscript.

(I) Typesetting, typography, or composition, which is the fabrication or production of composed type, or reproduction proofs thereof, for use in the preparation of printed matter. Typesetting, typography, or composition does not include the fabrication or production of a paste-up, mechanical, or assembly of which a reproduction proof is a component part.

(10) PUBLISHER. A publisher owns, outright or by license, the rights to reproduce, market, and distribute printed literature.

The proposed amendments contained in this document may not be adopted. Any revisions that are adopted may differ from this text.

(11) SYNDICATOR. A syndicator receives from authors original manuscripts, or reproduction proofs thereof, including columns, cartoons, and comic strip drawings, and distributes those manuscripts to publishers for publication.

(b) APPLICATION OF TAX.

(1) AUTHORS.

(A) The transfer by an author to a publisher or syndicator, for the purpose of publication, of an original manuscript or copy thereof, including the transfer of an original column, cartoon, or comic strip drawing, is a service, the charge for which is not subject to sales tax~~not subject to taxation. Tax does not apply even if the manuscript is transferred in machine-readable form.~~ The transfer of any paper, tape, diskette or other tangible personal property transferred as a means of expressing an idea is not taxable. If the author transfers the original manuscript or copy thereof in tangible form, such as on paper or in machine-readable form such as on tape or compact disc, that transfer is incidental to the author's providing of the service, and the author is the consumer of any such property. However, tax applies to the sale of the transfer of mere copies of an author's work is a sale of tangible personal property, and tax applies accordingly.

(B) Tax applies to charges for transfers of photographic images and illustrations, whether or not the photographic images or illustrations are copyrighted. Transfers of photographic images or illustrations illustrating text written by the photographer or illustrator are not taxable when they are merely incidental to the editorial matter.

(2) SYNDICATORS. The transfer by a syndicator to a publisher of impressed mats or proofs of syndicated columns, cartoons, or comic strip drawings for the purpose of publication is not subject to tax.

(3) DESIGNERS AND ART DIRECTORS. Fees paid to a designer or art director for his or her ability to design, conceive, or dictate ideas, concepts, or specifications are not subject to tax if the designer or art director does not transfer to the client or to any other person on behalf of the client title or possession of any tangible personal property used to convey the ideas. The designer or art director is the consumer of any paper, tape, film, diskette, or other tangible personal property used. Tax applies to the sale of such tangible personal property to, or use of such tangible personal property by, the designer or art director.

(4) PRODUCTION FUNCTIONS.

(A) Tax applies to the gross receipts from the retail sale of camera-ready art or camera-ready copy. The measure of tax includes charges for the performance of all production functions, whether the charges are separately stated or not.

The proposed amendments contained in this document may not be adopted. Any revisions that are adopted may differ from this text.

(B) A contract under which a person performs only the following functions (or any combination of the following functions) ~~only~~ is not subject to tax: ~~M~~manuscript mark-up, formatting, typesetting, proofreading, production coordination, and production editing. ~~If Charges for any of such functions are taxable when they are provided as part of the taxable sale of camera-ready copy or camera-ready art unless, are separable in the sense that there is no contract for the camera-ready copy or camera-ready art until after such functions are completed, in which case the charges for such functions are nontaxable.~~

(5) **CONTRACT TO PERFORM SERVICES AND TO FURNISH TANGIBLE PERSONAL PROPERTY.** One person may, under a single agreement, contract both to perform author, design, or art direction services, and to produce camera-ready copy or art. If, under the terms of the agreement, the client retains the right to approve the manuscript, layout, or general specifications before authorizing preparation of camera-ready copy or art, and if the author, designer, or art director does not transfer to the client title to the layouts or possession of the layouts other than for the purpose of review and approval only, then separately stated charges for performance of the services are not taxable. In the absence of specific contractual language, proof of client approval shall be evidenced by contemporaneous notation of receipt of approval in the records of the author, designer, or art director. No other proof shall be required.

(6) ~~ILLUSTRATIONS~~**PRELIMINARY ART.** Tax does not apply to separately stated charges for preliminary art, except where the preliminary art becomes physically incorporated into the finished art, as, for example, when the finished art is made by inking directly over a pencil sketch or drawing, or the approved layout is used as camera copy for reproduction. The charge for preliminary art is separately stated if it is must be billed separately to the client, either on a separate billing or separately charged for itemized on the billing for the finished art. ~~It must be provided it is clearly identified on the billing as roughs, visualizations, layouts, comprehensives, or other preliminary art. Proof of ordering or producing the preliminary art, prior to the date of the contract or approval for finished art, shall be evidenced by purchase orders of the buyer, or by work orders or other records of the seller. No other proof shall be required. Tax applies to the total charges made for finished art. If there is no separately stated charge for preliminary art, then there is no deduction for such services from the taxable measure for the sale of the finished art except as provided in subdivision (b)(2)(C) of Regulation 1540.~~

(7) **SALES BY PUBLISHERS.** Sales of printed literature are subject to tax unless the sale is for resale or is specifically exempted by law, e.g., qualifying sales of printed sales messages and sales in interstate and foreign commerce.

(8) **TRANSPORTATION CHARGES AND SERVICES RELATED TO TRANSPORTATION.** ~~In general, t~~Tax applies to charges for the transportation of printed matter in connection with a taxable retail sale except as provided in tangible personal property except under certain conditions. ~~For rules relating to transportation charges, see Regulation 1628, Transportation Charges.~~

The proposed amendments contained in this document may not be adopted. Any revisions that are adopted may differ from this text.

Separately stated charges for services such as addressing (by hand or by mechanical means), folding, enclosing, or sealing directly related directly to the transportation of printed material matter to the customer are not subject to the tax, ~~e.g., addressing (by hand or by mechanical means), folding, enclosing, or sealing~~. Tax applies, however, to charges for envelopes except as otherwise provided in Regulation 1541.5.

(9) PURCHASES OF PROPERTY FOR RESALE. Tax applies to the purchase of tangible personal property that is consumed in any production function and does not become a part of the finished product. However, a person may purchase such property for resale if that person's contract of sale with its client explicitly passes title to the property ~~passes to that person's client~~ prior to its use. Tangible personal property so purchased must be separately listed and priced on the person's sales invoice to the client ~~and sales tax charged when appropriate and sales tax applies to that charge~~. ~~Art work is considered to be used if it is photocopied. If artwork is purchased together with a photostat of the artwork and the purchaser uses only the photostat but not the artwork, the artwork may be purchased for resale. Tax applies to the charge made for the photostat.~~

(10) REPRODUCTION RIGHTS. Notwithstanding anything to the contrary in this regulation, if the transfer of a photographic image or artwork is made pursuant to a technology transfer agreement under subdivision (b)(2)(D)2. of Regulation 1540, tax applies to the transfer of the artwork in accordance with that provision.

(c) EXAMPLES OF THE APPLICATION OF TAX UNDER SPECIFIC CIRCUMSTANCES.

(1) A firm provides various services to a publisher. In performing a contract with the publisher, the firm buys a color separation from a third party. The firm does not make a copy of the color separation or use it in any way, but resells it to the publisher. The firm may give a resale certificate to the third party but tax applies to the sale to the publisher.

(2) The firm in Example (1) uses the color separation before reselling it to the publisher. Both the firm and the publisher are consumers, and both sales are subject to tax.

(3) The firm in Example (1) buys both the color separation and a photostatic copy (~~"stat"~~) of it from the third party who separately states the price of each item on ~~his~~ the sales invoice. The firm retains the ~~stat~~ photostatic copy but resells the color separation to the publisher without using it in any way. Since the third party used the color separation to make a copy of it, the sale of the component parts to the third party, or the third party's use of those component parts, is subject to tax. The firm may give a resale certificate to the third party for the color separation, but tax applies to the third party's sale of the ~~stat~~ photostatic copy. Tax also applies to the firm's sale of the color separation to the publisher.

(4) A firm contracts with a publisher to perform a contract in three stages, as follows:

The proposed amendments contained in this document may not be adopted. Any revisions that are adopted may differ from this text.

(A) The firm creates an original manuscript of a book. The publisher reviews the first draft, comments on it, and approves it. The firm then does developmental editing, in which the writer and editors develop the manuscript for sound editorial structure and organization. The publisher reviews the resulting second draft, comments on it, and approves it. The firm then does copy editing, in which editors review the manuscript for grammatical consistency and clarity. After this, the firm passes title to the manuscript to the publisher for the purpose of publication. Under the contract, the firm can proceed with further work only with the publisher's approval.

Tax does not apply to the sale of the finished manuscript or to any of the steps of writing and editing it.

(B) In the second stage, the publisher returns the accepted manuscript to the firm for typesetting into galleys, which the publisher reviews and approves. The firm then arranges the galleys into page form, which the publisher reviews and approves. The firm then produces camera-ready art, which the publisher reviews for approval or alterations. The publisher then accepts and takes title to the camera-ready art.

Tax applies to the firm's gross receipts from the sale of the camera-ready art, including formatting, typesetting, proofreading, and production coordination, whether separately stated or not. To preserve the ~~exempt~~ nontaxable status of the receipts described in Example (4)(A), ~~above~~, the ~~receipts~~ charges for work done in Example (4)(A) ~~should~~ must be separately stated from the ~~receipts~~ charges for the sale of the tangible personal property in this Example (4)(B).

(C) In the third stage, the publisher returns the camera-ready art to the firm for printing. The firm subcontracts the printing to a printer. The firm manages the quality of the printing. A representative of the publisher visits the printer to approve the work. At the firm's instruction, the printer ships the completed books to the publisher's warehouse.

~~The~~ Since the firm will be reselling the books to the publisher without using them, the firm may issue a resale certificate to the printer. Since the publisher intends to resell the books, the publisher may furnish ~~issue~~ a resale certificate to the firm, ~~who may in turn furnish a resale certificate to the printer (provided the firm does not use the completed books in any way).~~ Tax applies to sales of the books by the publisher to consumers unless the sales are specifically exempt by statute (e.g., sales in interstate commerce).

(5) A publisher owns an existing manuscript. The publisher contracts with an editorial design firm for developmental editing, copy editing, and design specifications. The firm reviews the manuscript and makes recommendations to the publisher for developing it into publishable form, including recommended layout and a general approach to design (e.g., trim size). After the publisher accepts these recommendations, a designer (at the firm or a subcontractor) prepares sample sketches and dummies to express the idea to the publisher. After the publisher approves the sketches and dummies, the designer creates type specifications. A developmental editor and

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a copy editor (at the firm or a subcontractor) perform development and copy editing services. The edited manuscript, dummies, and type specifications are transferred to the publisher.

Tax does not apply to the editing services because they are author's services. Tax does not apply to charges for the dummies and type specifications if ~~the charges for the dummies and type specifications~~ those charges are separately stated and if possession and title is retained by the editorial design firm.

(6) A publisher has an office in California and an office in New York. The publisher's California office purchases camera-ready art from a California production firm with title passing in California. However, the production firm, on instructions from the publisher, ships the camera-ready art directly to the publisher's New York office for use at the New York office, with no use of the camera-ready art in California.

Tax does not apply to the production firm's gross receipts from the sale of the camera-ready art, because the sale is in interstate commerce.

(7) A commercial artist (such as a commercial photographer or illustrator) makes a temporary transfer of finished art (such as a photograph or illustration) that qualifies as a technology transfer agreement under subdivision (b)(2)(D)2. of Regulation 1540 to a publisher for purposes of reproducing the finished art in a children's book. The publisher makes a computer scan of the finished art and returns the original finished art to the commercial artist. The publisher incorporates the computer scan into layouts which are used to reproduce the finished art in the printed children's books, which are then sold. The commercial artist is paid an advance against royalties, and is then paid royalties based on retail sales of the children's book. The commercial artist does not make a separate charge for the tangible personal property leased to the publisher in accordance with subdivision (b)(2)(D)2.a. of Regulation 1540. As provided in subdivision (b)(2)(D)2.b. of Regulation 1540, if the commercial artist has leased like property for a separate price to an unrelated third party without also transferring an interest in the copyright, or has leased that finished art or like finished art for a separate price satisfying the requirements of subdivision (b)(2)(D)2.a. of Regulation 1540, then tax applies to that separate price. Otherwise, tax applies to the commercial artist's transfer as specified in subdivision (b)(2)(D)2.c. of Regulation 1540. Except for the tax due under subdivision (b)(2)(D)2.b. or (b)(2)(D)2.c. of Regulation 1540, no further tax is due on the royalties or the advance paid to the commercial artist. Tax applies to the retail sales of the children's book unless specifically exempt by statute.

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Regulation 1528. PHOTOGRAPHERS, PHOTOCOPIERS, PHOTO FINISHERS AND X-RAY LABORATORIES.

Reference: Sections 6006, 6009, 6015, and 6020, Revenue and Taxation Code.

(a) PHOTOGRAPHERS AND PHOTOCOPIERS. Tax applies to sales of photographs, whether or not produced to the special order of the customer. Tax applies to sales of photocopies, whether or not produced to the special order of the customer, and to charges for the making of photographs or photocopies out of materials furnished by the customer or others. Except as provided in subdivision (b)(2), no deduction is allowable on account of expenses such as travel time, telephone calls, rental of equipment, or salaries or wages paid to assistants or models, whether or not such expenses are itemized in billings to customers.

Tax does not apply to sales to photographers and persons who make photocopies of tangible personal property which becomes an ingredient or component part of photographs or photocopies sold, such as mounts, frames, sensitized paper, and toner but does apply to sales to the photographer or producer of materials used in the process of making the photographs or photocopies and not becoming an ingredient or component part thereof, such as chemicals, trays, films, plates, proof paper, cameras, and copy machine drums.

See Regulation 1540, *Advertising Agencies and Commercial Artists*, for transfers of photographic images by commercial artists.

(b) PHOTOCOPYING OF RECORDS.

(1) GENERAL RULES. Tax applies to sales of photocopies of records. Persons who make and sell, or obtain and sell, photocopies of records to consumers are retailers of the photocopies whether they make the photocopies themselves, hire a subcontractor to make the photocopies, or acquire the photocopies for resale from the person who owns or maintains the records. Tax applies whether or not the copies are made at the business location of the retailer or at the location of the person who owns or maintains the records. The tax applies to the entire charge for making and selling, or obtaining and selling, photocopies, without deduction for expenses incurred in obtaining access to the records, travel time, time spent in selecting the particular records desired, the field service of photocopying or microfilming the records, telephone calls, file setup charges, basic fees, typing fees, document handling fees, or any other costs or expenses of filling the customer's order.

(2) SERVICE TRANSACTIONS. Merely because a fee is charged in connection with the transfer of a photocopy of a record does not mean that the transaction is a sale transaction under the Sales and Use Tax Law. If a person who owns or maintains the records (recordholder) is required by law to furnish the photocopy upon tender and payment of a fee, the transfer of the photocopies by that person is not a sale. For sales and use tax purposes, that person is the

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consumer of the photocopies transferred and charges by a photocopy company to the recordholder for the photocopies are subject to tax.

(A) Medical Records. Ordinarily tax does not apply to charges made by a hospital or other health care provider (recordholder) for photocopying of medical records. The transaction is regarded as a service transaction, and the fees are nontaxable if the photocopies are furnished to the patient, or to someone acting on behalf of the patient, or to the patient's representative as provided in Health and Safety Code section 123110(b). Likewise, the fees are nontaxable if the photocopies are furnished in response to a written authorization presented by an attorney or the attorney's representative as provided in Evidence Code section 1158, or if the photocopies are furnished as provided in subdivision (b)(2)(C) below. Tax does apply, however, if the hospital or other health care provider is not required by law to furnish photocopies but otherwise sells photocopies of records for a price. Charges made by a photocopy company directly to the requesting party for photocopies which, by agreement with the recordholder, were made and furnished directly to the requesting party are taxable in their entirety.

The preparation and service of a written authorization as provided in California Evidence Code Section 1158 is a nontaxable service. The tax does not apply to separately stated charges for this service even though the written authorization is served in connection with the performance of a contract to produce and deliver photocopies of records.

(B) Public Records. Tax does not apply to charges made by a public agency for photocopies of records furnished pursuant to the California Public Records Act or local law, ordinance, or resolution. Persons who obtain photocopies of public records from public agencies and sell the photocopies are making retail sales and must pay sales tax measured by their entire charge, including reimbursement of legally required fees.

(C) Witness Fees. Copying, witness, mileage or other fees which are charged by a person who furnishes copies of records in response to a subpoena as provided in California Evidence Code Section 1563 are not subject to tax. Separately stated charges by a photocopy company for the reimbursement of witness fees which were paid to the recordholder are not subject to tax. Tax does not apply to separately stated fees, made by a person who makes or acquires records for another for advancing payment of statutory witness fees. Such fees, commonly identified as "check charges", are made to cover the cost of providing the check, advancing moneys, and associated bookkeeping costs. When a witness fee is charged, the "check charge" will be regarded as part of the charge for a nontaxable service and not as a part of the charge made for the tangible personal property.

(3) PREPARATION OF SUBPOENA DUCES TECUM. The preparation and service of a subpoena duces tecum is a nontaxable service. The tax does not apply to separately stated charges made for the service even though the subpoena is served in connection with the performance of a contract to produce and deliver photocopies of records.

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(4) TYPEWRITTEN TRANSCRIPTIONS AND INTERPRETATION OF MEDICAL RECORDS. The tax does not apply to a separately stated charge made for providing a typewritten transcription of a medical report or an interpretation of the contents of a medical record. However, the tax applies to the fair retail value of any photocopies produced for the customer in connection with the nontaxable service.

(c) PHOTO FINISHERS.

(1) PRINTS AND ENLARGEMENTS. Tax applies to charges for printing pictures or making enlargements from negatives or slides furnished by the customer.

Tax applies to sales to photo finishers of all tangible personal property used by them in printing pictures or making enlargements except property becoming an ingredient or component part of the prints, enlargements and other items sold by them.

(2) COLORING AND TINTING. Tax applies to charges for coloring and tinting new pictures.

Tax does not apply to sales of colors and tints to photo finishers for use by them in coloring and tinting new pictures.

(3) FILM PROCESSING.

(A) Negative Development of Customer Furnished Film. Tax does not apply to separately stated charges for the negative development of customer furnished film. Development of film by the reverse process method is not the negative development of film.

Tax applies to sales of chemicals for use in such negative development whether or not the chemicals become a component part of the negative.

(B) Other Film Processing. Tax applies to all film processing charges other than separately stated charges for the negative development of customer furnished film. For example, tax applies to charges for development of film by the reverse process method.

Tax applies to sales of chemicals for use in such film processing if the chemicals do not become a component part of the processed film transferred to customers. Tax does not apply to sales of chemicals which do become a component part of film sold to customers before use.

(d) X-RAY LABORATORIES. Producers of X-Ray films or photographs for the purpose of diagnosing medical or dental conditions of humans, excluding such films and photographs used only for cosmetic purposes, are the consumers of materials and supplies used in the production thereof. Thus, the tax applies to the sale of such materials and supplies to laboratories producing X-Ray films or photographs for the purpose of such diagnoses. Whether the laboratory is a "lay laboratory" or is operated by a physician, surgeon, dentist or hospital is immaterial. Producers of X-Ray films or photographs for any other purpose such as use for purely cosmetic purposes,

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diagnosis of medical or dental conditions of animals, inspection of metals, welds and similar purposes are retailers of the films or pictures and the tax applies to the gross receipts from the retail sale thereof. If, however, an X-Ray laboratory contracts to furnish an X-Ray inspection service, retaining title to and possession of the X-Ray or pictures produced, charges for the performance of such an inspection service are not subject to tax.

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Regulation 1541. PRINTING AND RELATED ARTS.

Reference: Sections 6006-6012, Revenue and Taxation Code.

(a) DEFINITIONS.

~~-(1) SPECIAL PRINTING AID. The term "special printing aid" means a reusable manufacturing aid which is used by a printer during the printing process and is of unique utility to a particular customer. Examples of special printing aids include, but are not limited to, electrotypes, stereotypes, photoengravings, silk screens, steel dies, cutting dies, lithographic plates, artwork, film, single color, or multicolor separation negatives, and flats.~~

~~-(2) PRINTING PROCESS. The term "printing process" includes, but is not limited to, letterpress, flexography, gravure, offset lithography, reprography, screen printing, steel die engraving, thermography, laser, inkjet, and photocopying.~~

~~-(3) REPRODUCTION PROOF. A direct impression of composed type forms containing type matter only or type matter combined with clip art, or a copy of that direct impression made by any method including the diffusion transfer method, and used exclusively for reproduction.~~

~~-(4) MECHANICAL OR PASTE-UP. Preparation of copy to make it camera-ready with all type and design elements pasted on artboard or illustration board in exact position and containing instructions, either in the margins or on an overlay, for the platemaker. Also referred to as camera-ready art or camera-ready copy.~~

~~-(5) CLIP ART. Prepackaged art (including photographic images), not produced to the special order of the customer, commercially available on CD-Rom, other electronic media or by computer program for use in digital page layout. Images that are enlarged, reduced or rotated are not considered "produced to the special order of the customer." When distributed in digital form, clip art is often referred to as "click art".~~

(1) CLIP ART. Clip art is prepackaged art (including photographic images) which is not produced to the special order of the customer and which is commercially available on CD ROM, other electronic media, or by computer program for use in digital page layout. Images that are enlarged, reduced, or rotated are not considered "produced to the special order of the customer."

(2) COLOR SEPARATOR. A color separator is a person who engages in the process of color separation. The process of color separation divides a full color photographic image into four separate components, corresponding to the four primary colors used in process color printing. The color separator may accomplish this photographically or electronically, and the products of this process may be either a negative or positive film separation or a separated printing plate.

(3) COLOR SEPARATION WORKING PRODUCTS. Color separation working products consist of property such as photographic film for making transparencies, masks, internegatives,

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interpositives, halftone negatives, composite color separation negatives, goldenrod paper and mylar plastic used in making flats, tape used in stripping negatives into flats, developing chemicals which become a component part of negatives and positives, proofing material and ink used in making final proofs, progressive proofs, and similar items, which are similar in function to special printing aids as defined in subdivision (a)(12).

(4) DIGITAL PRE-PRESS INSTRUCTION. Digital pre-press instruction is the creation of original information in electronic form by combining more than one computer program into specific instructions or information necessary to prepare and link files for electronic transmission for output to film, plate, or direct to press, which is then transferred on electronic media such as tape or compact disc.

(5) FINISHED ART. Finished art is the final artwork used for actual reproduction by photomechanical or other processes, or used for display. It includes electronic artwork, illustrations (e.g. drawings, diagrams, halftones, or color images), photographic images, sculptures, paintings, and handlettering.

(6) INTERMEDIATE PRODUCTION AIDS. Intermediate production aids include items such as artwork, illustrations, photographic images, photo engravings, and other similar materials which are used to produce special printing aids or finished art~~other intermediate production aids.~~

(7) MECHANICAL OR PASTE-UP. A mechanical or paste-up (also called camera-ready art or camera-ready copy) is produced by preparing copy to make it camera-ready with all type and design elements, and then pasting the prepared copy on artboard or illustration board in exact position along with instructions, either in the margins or on an overlay, for the platemaker.

(8) PRINT BROKER. A print broker is a person who contracts to sell printed matter, but who does not actually engage in the printing process to produce the printed matter to be sold, instead purchasing the printed matter from a printer or from another print broker for resale to the print broker's customer. A person who sells printed matter for which that person did not engage in the printing process is acting as a print broker even if that person engages in the print process for other contracts.

(9) PRINTER. A printer is a person engaged in the printing process.

(10) PRINTING PROCESS. The printing process involves activities related to the production of printed matter such as letterpress, flexography, gravure, offset lithography, reprography, screen printing, steel-die engraving, thermography, laser printing, inkjet printing, and photocopying.

(11) REPRODUCTION PROOF. A reproduction proof is used exclusively for reproduction. It consists of either a direct impression of composed type forms containing type matter only or

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type matter combined with clip art, or a copy of that direct impression made by any method, including the diffusion transfer method.

(12) SPECIAL PRINTING AIDS. Special printing aids are reusable manufacturing aids which are used by a printer during the printing process and are of unique utility to a particular customer. Special printing aids include electrotypes, stereotypes, photoengravings, silk screens, steel dies, cutting dies, lithographic plates, film, single color or multicolor separation negatives, and flats. For purposes of this regulation, special printing aids includes items defined by subdivision (a)(6) as intermediate production aids.

(b) APPLICATION OF TAX.

~~(1) SALES BY PRINTERS. Tax applies to charges for printing of tangible personal property for consumers, regardless of whether or not the paper and other materials are furnished by the consumer. The production of printed matter for a consumer is a sale of tangible personal property whether the materials incorporated into the printed matter are furnished by the consumer or the printer. Unless that sale is exempt from tax, The measure of tax is tax applies to the total gross receipts or sales price of the sale with no deduction on account of: (a) the cost of the raw materials or other components; (b) labor or service costs of any step in the process of producing, fabricating, processing, printing, or imprinting the tangible personal property; or (c) any other expenses or services that are a part of the sale. Services that are a part of the sale of tangible personal property to consumers include, but are not limited to charges for overtime, set-up, die cutting, embossing, folding (except as provided in subdivision (h)(g) below), and other binding operations. Printers may not deduct from the gross receipts or sales price from of their sales of printed matter charges related to their typography work or the cost of typography or typesetting to them, nor can they deduct the costs of special printing aids for which they are consumers under subdivision (c)(1)(A), whether or not a separate charge is made to the customer for the special printing aids. Receipts attributable to such costs are includable in the measure of tax.~~

Tax applies to a printer's sale of special printing aids as provided in subdivision (c).

~~(2) PURCHASES BY PRINTERS. Printers are consumers of tangible personal property which is not sold prior to use or physically incorporated into the article to be sold. Tax applies to the sale of such property to, or to the use of the property by, the a printer and also to any sale subsequent to its use by the printer. Such property includes, but is not limited to, Property ordinarily consumed by a printer includes machinery (e.g., printing presses, cameras, electronic digital pre-press equipment, and plate makers), office equipment, and printing aids. Printers, however, may purchase special printing aids for resale as explained in subdivision (c).~~

~~(c) SPECIAL PRINTING AIDS. In General. In recognition of the unique utility that special printing aids have to the sale of printed material, and the need to avoid burdening businesses with unnecessary paperwork, the following presumptions shall apply.~~

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~~–(1) With respect to sales of printed material ultimately subject to sales tax, or sales to the U. S. Government, it shall be presumed that the selling price of the printed material includes the selling price of the special printing aids and that title passed to the customer, irrespective of whether or not the printer separately itemizes the special printing aids. It shall be further presumed that the printer, or other reseller, discussed in the following paragraph, made no use of the special printing aids prior to their sale. Accordingly the printer may purchase the special printing aids for resale.~~

~~“Ultimately subject to sales tax,” means either the printer's sale of the printed material and special printing aids is subject to sales tax or is an exempt sale to the U. S. Government, or if the printer's sale of the printed material is for resale, a subsequent sale of the printed material and special printing aids is subject to California sales tax or is an exempt sale to the U. S. Government.~~

~~When the printer's sale of printed material is a sale for resale, as described in the above paragraph, unless the printer timely takes a valid resale certificate in good faith that states the special printing aids are to be purchased for resale, tax is due on the selling price of the special printing aids whether or not the selling price is separately itemized. The selling price of the special printing aids is deemed to be the sales price of the special printing aids, or their components, to the printer regardless of the amount of the separately stated charge, if any, for the special printing aid. The printer need not separately charge sales tax reimbursement to their customer and if the printer has paid sales or use tax on the selling price of the special printing aids or their components to the printer, no additional tax is due.~~

~~The term “special printing aids” on a resale certificate shall be sufficient to cover all special printing aids as defined in subdivision (a)(1).~~

~~–(2) If a printer does not wish to sell special printing aids in connection with the sale of printed material ultimately subject to sales tax or sold to the U. S. Government, described in (c)(1) above, the following statement should be included on the sales invoice: “The selling price of the printed material does not include the transfer of title to the special printing aids.” The printer would then be the owner and consumer of the special printing aids. Tax would apply to both the retail sale of the printed material and the cost to the printer of the special printing aids.~~

~~–(3) With respect to all other sales of printed material, as for example, sales in interstate commerce, sales of exempt newspapers or periodicals, or sales of exempt printed sales messages, it shall also be presumed that the selling price of the printed material includes the selling price of the special printing aids and that title passed to the customer irrespective of whether or not the printer separately itemizes the special printing aids. It shall be further presumed that the printer made no use of the special printing aids prior to their sale. Sales tax is due on the selling price of the special printing aids whether or not the selling price of the special printing aids is separately stated. The selling price of the special printing aids is deemed to be the sales price of the special~~

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~~printing aids, or their components, to the printer regardless of the amount of the separately stated charge, if any, for the special printing aid.~~

~~The printer need not separately charge sales tax reimbursement to their customer and if the printer has paid sales or use tax on the selling price of the special printing aids or their components to the printer, no additional tax is due.~~

~~However, sales tax is not due on the selling price of the special printing aids discussed in (c)(3) if the printer timely takes a valid resale certificate in good faith that states the special printing aids are to be purchased for resale. The term “special printing aids” on a resale certificate shall be sufficient to cover all special printing aids as defined in subdivision (a)(1).~~

~~Persons issuing resale certificates for special printing aids as discussed in (c)(3) are then liable for the tax on their selling price of the special printing aids irrespective of whether or not the printer separately itemized the printing aids to the person issuing the resale certificate and notwithstanding that the printed material is exempt from tax as for example, a sale in interstate commerce, a sale of exempt newspapers or periodicals or a sale of exempt printed sales messages. In no event shall the selling price of the special printing aids be less than the selling price of the special printing aids, or their components, to the printer.~~

~~If the printer’s sale includes both a sale of printed material ultimately subject to sales tax, as described in (c)(1) above, and a sale of printed material as described in (c)(3) (“split sale”), tax is due on the selling price of the special printing aids. Absent a separate itemization, as long as tax is reported on an amount equal to at least the selling price of the special printing aids or their components to the printer, no further tax will be due on the selling price of the special printing aids.~~

~~–(4) If a printer does not wish to sell special printing aids in connection with all other sales of printed material, as discussed in (c)(3) above, the following statement should be included on the sales invoice: “The selling price of the printed material does not include the transfer of title to the special printing aids.” The printer would then be the owner and consumer of the special printing aids. Tax would apply to the cost to the printer of the special printing aids.~~

~~–(5) No other proof shall be required with respect to passage of title on special printing aids.~~

(c) SPECIAL PRINTING AIDS. In recognition of the unique utility that special printing aids have to the production of printed matter, the practices of the industry, and the need to avoid burdening businesses with unnecessary paperwork, the presumptions and rules set forth in this subdivision apply to a printer’s purchase and sale of special printing aids used to produce printed matter sold by the printer.

(1) PRINTER’S PURCHASE OF SPECIAL PRINTING AIDS.

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(A) When a printer who uses special printing aids to produce printed matter does not wish to sell those special printing aids in connection with the printer's sale of the printed matter so produced, the printer shall include the following or substantially similar statement in the contract or the sales invoice: "Special printing aids are not being sold to the customer as part of the sale of the printed matter, and the selling price of the printed matter does not include the transfer of title to the special printing aids." When this statement, or a substantially similar statement, is included in the contract or sales invoice, the printer retains title to the special printing aids and is the consumer thereof, without regard to whether the printer separately itemizes a charge for the special printing aids. Accordingly, the printer may not issue a resale certificate to purchase such special printing aids for resale, and tax applies to the cost to the printer of those special printing aids.

(B) Unless the printer includes a statement in the contract or sales invoice retaining title to the special printing aids, as described in subdivision (c)(1)(A), it shall be irrebuttably presumed that the printer resold to the customer the special printing aids purchased or produced by the printer for use on the customer's job, prior to any use, along with the printed matter produced with the special printing aids, without regard to whether the printer separately itemizes a charge for the special printing aids. Accordingly, unless the printer includes a statement in the contract or sales invoice retaining title, the printer may issue a resale certificate when purchasing such special printing aids or their components. If the vendor of the special printing aids to the printer does not take a valid and timely resale certificate from the printer stating that the special printing aids are for resale, the vendor has the burden of showing that the printer actually resold the special printing aids prior to use as provided in this subdivision.

(2) PRINTER'S SALE OF SPECIAL PRINTING AIDS. When the printer is regarded as purchasing the special printing aids for resale under subdivision (c)(1)(B), the following rules apply to determine the application of tax to the printer's sale of those special printing aids along with the printed matter produced with the special printing aids.

(A) Retail Sales of Special Printing Aids.

1. Sales to the United States Government. When a printer makes a retail sale of special printing aids along with the printed matter produced with those special printing aids to the United States Government, the sale of the printed matter and the special printing aids to the United States Government is exempt from tax as provided in Regulation 1614.

2. With nontaxable sale of printed matter. When a printer makes a retail sale of special printing aids to anyone other than the United States Government along with a nontaxable sale of printed matter (such as an exempt sale in interstate commerce, an exempt sale of qualifying newspapers, periodicals, or printed sales messages, or a nontaxable sale for resale), the printer's sale of the special printing aids is subject to sales tax. The printer's taxable gross receipts or sales price from the sale of the special printing aids is deemed to be the sale price of the special printing aids, or their components, to the printer without regard to whether the printer separately

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states a charge for the special printing aids or, if the printer does so, without regard to the amount of that separately stated charge, and tax is due measured by that sale price. If the printer has paid California sales tax reimbursement or use tax on the sale price of the special printing aids or their components to the printer, no additional tax is due.

3. With taxable sale of printed matter. When a printer makes a retail sale of special printing aids along with the taxable retail sale of printed matter, tax applies to the entire charge for the printed matter and special printing aids, without regard to whether the charge for the special printing aids is separately stated. If the printer does not make a separate charge for the special printing aids, the charge for the printed matter is deemed to include the taxable charge for the special printing aids, and no further tax is due on account of the sale of those special printing aids.

(B) Nontaxable Sales of Special Printing Aids for Resale. A person purchasing printed matter for resale may also purchase the special printing aids used to produce the printed matter for resale if that person will, in fact, resell the special printing aids prior to any use. A printer will not be regarded as selling special printing aids for resale unless: 1) the printer separately states the sale price of the special printing aids in an amount not less than the sale price of the special printing aids, or their components, to the printer; and 2) the printer accepts a timely and valid resale certificate in good faith from the printer's customer stating that the special printing aids are purchased for resale. The term "special printing aids" on a resale certificate shall be sufficient to cover all special printing aids as defined in subdivision (a)(12), and a printer accepting such a resale certificate in good faith will be regarded as selling the special printing aids for resale provided the printer includes the required separately stated price for them. Otherwise, the printer will be regarded as selling the special printing aids at retail, and will owe tax on that retail sale accordingly. A printer might sell special printing aids for resale along with printed matter under circumstances where the sale of the printed matter is for resale and also qualifies for exemption, such as a sale in interstate commerce where the purchaser will then resell the printed matter prior to use. However, since a purchaser of special printing aids from a printer would not be regarded as purchasing them for resale unless reselling them as part of the sale of the printed matter produced with those special printing aids, a printer claiming its sale of special printing aids is for resale should take a resale certificate for its sale of the printed matter as well, even if the sale of that printed matter would also qualify for exemption.

1. Sales of printed matter to multiple purchasers. A person is not purchasing special printing aids for resale when title to the special printing aids does not pass to that person's customer prior to any use. If that person's customer does not obtain the right to exercise dominion and control over the special printing aids, the person will not be selling the special printing aids to its customer and cannot purchase the special printing aids for resale. A person does not purchase special printing aids for resale when the printed matter produced with those special printing aids is sold to several purchasers. For example, a person purchasing newspapers for individual sale cannot purchase special printing aids for resale because the individual purchasers of the newspaper are not also purchasing the special printing aids. A person

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purchasing posters for sale to the general public is not purchasing special printing aids for resale to the general public. A person purchasing printed cartons to pack items for individual sale is not purchasing the special printing aids used to produce the cartons for resale to the ultimate purchasers of the contents of the carton. In addition to the fact that the multiple purchasers in each of these cases could not at any time be regarded as purchasing the special printing aids, the retail purchaser of the end product is not known at the time the special printing aids are used, meaning that the special printing aids could not in any event be resold to those purchasers prior to use.

2. Existing obligation to resell special printing aids. A person cannot purchase special printing aids for resale when that person does not have an existing obligation to resell those particular special printing aids since, if the purchaser does not have such an existing obligation to resell the special printing aids, the printer will use them on the purchaser's behalf before they could be resold by the purchaser. An existing obligation may be represented by a purchase order, invoice, or other existing agreement, whether oral or in writing. If the existing obligation is an oral agreement, the person purchasing the special printing aids for resale must have some means to establish that the agreement was in existence no later than the time the special printing aids were used in the printing process.

(C) Split Sales. A printer may use special printing aids to produce printed matter where a portion of the sale is taxable and a portion of the sale is not taxable, such as the sale of printed sales messages some of which are delivered as required for exemption by Regulation 1541.5 and some of which are delivered directly to the purchaser. If a printer makes a sale of printed matter where a portion of the sale is taxable and a portion is not taxable along with a retail sale of the special printing aids used to produce that printed matter, tax is due on the full sale price of the special printing aids. If the printer separately states a charge for the special printing aids in an amount not less than the sale price of the special printing aids or their components to the printer, tax applies to that separate charge. In the absence of such a separate charge, the taxable portion of the sale of printed matter will be regarded as including the sale of the special printing aids provided that the measure of tax on that sale is at least equal to the sale price of the special printing aids or their components to the printer. If so, no further tax is due for the printer's sale of the special printing aids. If the measure of tax on the sale of the printed matter is less than the sale price of the special printing aids or their components to the printer, then the printer owes tax on the difference.

(3) PURCHASES AND SALES OF SPECIAL PRINTING AIDS BY PRINT BROKERS.

(A) Print Broker's Purchase of Special Printing Aids for Resale. A person who purchases special printing aids for resale with printed matter but who will not itself use those special printing aids in the printing process is a print broker for that purchase and resale. A print broker who will acquire title to special printing aids from a printer or other print broker will be irrebuttably presumed to have resold the special printing aids to the customer, prior to any use, along with the printed matter produced with the special printing aids provided the print broker

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has, at the time of acquisition of the special printing aids, an existing obligation with a customer for the sale of printed matter and the print broker does not include a statement in the contract or sales invoice retaining title to the special printing aids, as described in subdivision (c)(1)(A). Accordingly, unless the print broker includes a statement in the contract or sales invoice retaining title, the print broker may purchase such special printing aids for resale pursuant to its existing obligation and issue a resale certificate for both the special printing aids and the printed matter. However, without regard to the taking of a resale certificate, a printer or print broker is regarded as making a retail sale of the special printing aids, and not a sale for resale, unless the printer or print broker separately states the charge for those special printing aids, which charge cannot be less than the sale price of such printing aids, or their components, to the printer.

(B) Print Broker Issuing Resale Certificate. A print broker who issues a resale certificate for the purchase of special printing aids is liable for tax on the print broker's sale price of the special printing aids, even if the print broker's sale of the printed material produced with the special printing aids is not subject to tax (such as an exempt sale in interstate commerce, an exempt sale of qualifying newspapers, periodicals, or printed sales messages, or a nontaxable sale for resale), unless the print broker sells the special printing aids to the United States Government or to another print broker who issues a timely and valid resale certificate in good faith as provided in this subdivision (c).

(C) Print Broker's Retail Sales of Special Printing Aids.

1. Sales to the United States Government. When a print broker who purchases special printing aids under a resale certificate sells those special printing aids along with the printed matter produced with those special printing aids to the United States Government, the sale of the special printing aids to the United States Government is exempt from tax as provided in Regulation 1614.

2. With nontaxable sale of printed matter. When a print broker who purchases special printing aids under a resale certificate makes a retail sale of special printing aids to anyone other than the United States Government along with a sale of printed matter that is not taxable (such as an exempt sale in interstate commerce, an exempt sale of qualifying newspapers, periodicals, or printed sales messages, or a nontaxable sale for resale), that sale of the special printing aids is subject to tax. If the print broker separately states a charge for the special printing aids that is not less than the printer's separately stated sale price for the special printing aids to the print broker, then tax applies to that separately stated sale price. Otherwise, tax applies to the the print broker's sale of the special printing aids measured by the printer's separately stated sale price to the print broker.

3. With taxable sale of printed matter. When a print broker who purchases special printing aids under a resale certificate makes a retail sale of those special printing aids along with the taxable retail sale of printed matter, tax applies to the entire charge for the printed matter and special printing aids, without regard to whether the charge for the special printing aids is

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separately stated. If the print broker does not make a separate charge for the special printing aids, the charge for the printed matter is deemed to include the taxable charge for the special printing aids, and no further tax is due on account of those special printing aids.

4. Split Sales. A print broker may sell special printing aids to produce printed matter the sale of which is partially exempt and partially subject to tax, such as the sale of printed sales messages some of which are delivered as required for exemption by Regulation 1541.5 and some of which are delivered directly to the purchaser. If a print broker makes a sale of printed matter where a portion of the sale is taxable and a portion is not taxable along with a retail sale of the special printing aids used to produce that printed matter, tax is due on the full sale price of the special printing aids. If the print broker separately states a charge for the special printing aids in an amount not less than the printer's separately stated sale price of the special printing aids to the print broker, tax applies to that separate charge. In the absence of such a separate charge, the taxable portion of the sale of printed matter will be regarded as including the sale of the special printing aids provided that the measure of tax on that sale is at least equal to the printer's separately stated sale price of the special printing aids to the print broker; if so, no further tax is due for the print broker's sale of the special printing aids, but if the measure of tax on the sale of the printed matter is less than the printer's separately stated sale price of the special printing aids to the print broker, then the print broker owes tax on the difference.

(d) CONCEPTUAL SERVICES.

(1) When the printer makes a lump sum charge for a taxable sale of printed matter, the full lump sum charge is subject to tax with no deduction on account of any conceptual or other services performed to produce that printed matter. When the printer itemizes its charges for a taxable sale of printed matter, tax applies to the printer's entire charge except as provided below.

(2) As part of its contract to produce and sell printed matter, a printer may also agree to acquire finished art for use in producing the printed matter, and the acquisition of that finished art may involve the providing of services to convey ideas, concepts, looks, or messages to a printer's customer which result in a transfer, enhancement, or revision of either electronic artwork, hard copies of electronic artwork, or copies of manually prepared artwork. If the printer states a separate charge for such services which are itemized as "design charges," "preliminary art," "concept development," or any other designation that clearly indicates that the charges are for such services and not for finished art, they are nontaxable unless the contract of sale provides that the printer will pass to its customer title or the right to permanent possession of the artwork in tangible form, such as on electronic media or hard copy, or permanent possession of the artwork in tangible form is, in fact, transferred to the client. The remainder of the printer's charge is subject to tax.

(3) If a printer separately itemizes charges for finished art that also include charges for conceptual services described in subdivision (d)(2), it will be rebuttably presumed that 75 percent of the combined charge for the finished art and conceptual services is for the nontaxable

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services. If, however, the printer acquires the finished art and conceptual services from a commercial artist (rather than producing the finished art itself) and the commercial artist itemizes a separate charge for conceptual services that is less than 75 percent of the commercial artist's combined charge for conceptual services and finished art, that lesser percentage shall be applied to the printer's combined charge for final art and conceptual services to determine the total nontaxable charges for conceptual services. Tax applies to the remaining portion of the combined charge for final art and conceptual services unless: 1) the printer passes title to the final art to its customer; and 2) that transfer qualifies a technology transfer agreement under subdivision (b)(2)(D)2 of Regulation 1540, in which case tax applies to the charge for finished art in accordance with that provision. A separately itemized charge for special printing aids is not a separately itemized charge for finished art and conceptual services, and no portion of that charge is excluded from tax as a charge for nontaxable conceptual services.

~~(d)~~(e) **COLOR SEPARATORS.** The application of tax to printers as explained in this regulation subdivisions (b) and (e) also applies to color separators. Color separators are consumers and not retailers of tangible personal property which is not sold prior to use or physically incorporated into the article to be sold. Tax applies to the sale of such property to, or to the use of such property by, the color separator. Examples of such property include, ~~but are not limited to,~~ filters and screens, trial proofing materials, disposable lithographic plates, and developing chemicals which do not become incorporated into the article sold. Color separator working products are special printing aids for purposes of this regulation, and the provisions of subdivision (c) apply to their purchase and sale. Color separators, and persons such as printers when acting as color separators, ~~or printers~~ may purchase property ~~such as photographic film for making transparencies, masks, internegatives, interpositives, halftone negatives, composites color separation negatives, goldenrod paper and mylar plastic used in making flats, scotch tape used in stripping negatives into flats, developing chemicals which become a component part of negatives and positives, proofing material and ink used in making final proofs, progressive proofs, and similar items, which are similar in function to special printing aids as defined in subdivision (a)(8) (a)(1), all commonly referred to as "color separator working products" for resale when title to such property passes to the customer prior to use by the color separator or the printer as described in subdivision (c).~~ The term "color separator working products" or "special printing aids" on a resale certificate shall be sufficient to cover all such products.

Charges for alterations of film work for \$100 or less shall be considered charges for restoring property to its original condition and not subject to tax. Charges greater than \$100 shall be considered charges for fabrication labor and subject to tax.

~~(e)~~(f) **COMPOSED TYPE.**

(1) IN GENERAL. Tax does not apply to the fabrication or transfer by a typographer or typesetter of composed type, or reproduction proofs of such composed type to printers to use in the preparation of printed matter. The composition of type is the performance of a service, and tax does not apply to charges for such service, unless that service is a part of the sale of printed

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matter. Tax applies to the gross receipts from the sale of printed matter without any deduction for the charge for typography. ~~Tax applies~~ See subdivision (e)(3) below for the application of tax to charges for transfers of composed type combined with artwork as provided in subdivision (f)(3).

Typographers and typesetters are the consumers and not retailers of materials, such as typesetting machinery, metal forms, galleys, proofing paper, and cleaners which are used in the performance of their service and are consumers of materials transferred to their customers incidental to the performance of nontaxable typography or typesetting services, such as clip art that is combined with text on the same page.

Composed type includes type together with lined borders and plain, straight, fancy, or curved lines. Composed type also includes charts, tables, graphs, and similar methods of providing information.

(2) PHOTOCOMPOSITION (INCLUDING PHOTOTYPESETTING AND COMPUTER TYPESETTING). Tax does not apply to the composing of type regardless of whether the type is composed by means of such simplified methods as standard typewriter, desktop publishing, Varityper or Justowriter; by means of photolettering or headlining machines; or by means of a photocomposition (including computer photocomposition) method. Tax does not apply to the transfer, whether temporary or permanent, of the direct product of the type composition service or copy thereof (e.g., typeset matter direct from the typesetting machine ready to be cut and pasted up for reproduction or computer generated type), if that product contains text only or text combined with clip art, whether that product is a paper or film (negative or positive) product, provided the product or copy is to be used exclusively for reproduction.

The transfer of camera-ready copy containing text only or text and clip art in the form of a paste-up, mechanical, or assembly, or a camera-ready reproduction of such, is the transfer of composed type and the charge made by the typographer or typesetter to his or her customer is not subject to tax. Tax does not apply to the transfer of a direct photoreproduction of type composed by means of a photolettering or headlining machine or other similar device.

Camera-ready copy which is produced through the use of desktop publishing software and a personal computer is nontaxable composed type provided it does not contain artwork other than clip art.

Transfers of plates and mats for use in the printing process which are produced using composed type are subject to tax, and tax applies to the entire charge made to the customer including any portion of the charge attributable to the type composition service, whether that charge is separately stated or not. Transfers of engraved printing plates and duplicate plates such as electrotypes, plastic plates, rubber plates, and other plates used in letterpress printing are subject to tax. Similarly, transfers of exposed presensitized, wipe-on, deep-etch, bi-metal and other plates used in offset lithography or of exposed plates produced by a photo-direct method, do not

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qualify as transfers of reproduction proofs of composed type and are subject to tax. A transfer of gelatin coated film to be transferred to fine mesh silk in the silk-screening process is subject to tax.

(3) ARTWORK. Artwork, other than clip art combined with composed type on the same page, is not composed type. The term “artwork” includes, ~~but is not limited to,~~ illustrations (e.g., drawings, diagrams, halftones, or color images), photographic images, drawings, paintings, handlettering, and computer generated artwork. If the basis for billing is on a per page basis, the charge for any page with artwork is subject to sales tax and the charge for any page with only text, or text and clip art, is not subject to tax. If the basis for billing is lump sum, the ratio of pages containing artwork to the total number of pages, applied to the lump sum charge, represents the retail ~~selling-sale~~ price of the artwork and is subject to tax, but in no event shall the retail ~~selling-sale~~ price of the artwork be less than the ~~selling-sale~~ price of the artwork, or its components, to the typographer.

However, ~~if the ratio computed above is 10% or less ten percent or fewer of the pages contain artwork,~~ the true object of the sale shall be deemed to be a sale of typography services with an incidental transfer of artwork, and the typographer is the consumer of ~~the that~~ artwork. Tax applies to the ~~selling-sale~~ price of the artwork, or its components, to the typographer. Tax does not apply to the sale of the typography service as explained in ~~(e)(1)~~ subdivision (f)(1).

(4) REPRODUCTION RIGHTS. Notwithstanding subdivision (f)(3), if the transfer of artwork qualifies as a technology transfer agreement under subdivision (b)(2)(D)2. of Regulation 1540, tax applies to the transfer of the artwork in accordance with that provision.

(f)(g) TRANSFERS OF INFORMATION ON COMPUTER DISK OR OTHER ELECTRONIC MEDIA-DIGITAL PRE-PRESS INSTRUCTION.

~~The transfer by the seller of the original information created by combining more than one computer program into specific instructions or information necessary to prepare and link files for electronic transmission for output to film, plate, or direct to press, is not subject to tax when transferred by computer disk or other electronic storage media and the original information is a custom computer program. Such a process, currently termed “electronic or digital pre-press instruction,” creates a new program which shall be considered Digital pre-press instruction is a custom computer program as defined under section 6010.9 of the Revenue and Taxation Code, the sale of which and is not subject to tax, provided if the electronic or digital pre-press instruction is prepared to the special order of the purchasercustomer. The electronic or dDigital pre-press instruction shall not, however, be regarded as a custom computer program if it is a “canned” or prewritten computer program which is held or existing for general or repeated sale or lease, even if the electronic or digital pre-press instruction was initially developed on a custom basis or for in-house use. The sale of such canned or prewritten digital pre-press instruction in tangible form is a sale of tangible personal property, the retail sale of which is subject to tax.~~

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~~(g)~~**(h)** **MAILING.** Tax does not apply to charges for postage or for addressing for the purpose of mailing (by hand or by mechanical means), folding for the purpose of mailing, enclosing, sealing, preparing for mailing, or mailing letters or other printed matters, provided such charges are stated separately on invoices and in the accounting records. Tax applies, however, to charges for envelopes.

~~(h)~~**(i)** **SIGNS, SHOW CARDS, AND POSTERS.** Tax applies to retail sales of signs, show cards, and posters, and to charges for painting signs, show cards, and posters, whether the materials are furnished by the painter or by the customer.

Tax does not apply to charges for painting or lettering on real property. The painter or letterer is the consumer of the materials used in such work, and tax applies with respect to the sale of such property to, or the use of such property by, the painter or letterer ~~him~~.

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Regulation 1540. ADVERTISING AGENCIES AND COMMERCIAL ARTISTS.

Reference: Sections 6006 - 6015, Revenue and Taxation Code.

(a) DEFINITIONS.

(1) ADVERTISING. Advertising is commercial communication utilizing one or more forms of communication (such as television, print, billboards, or the Internet) from or on behalf of an identified person to an intended target audience.

(2) ADVERTISING AGENCIES. Advertising agencies design and implement advertising campaigns for purposes of advertising the goods, services, or ideas of their clients. As part of that primary function, advertising agencies provide their clients with services (such as consultation, consumer research, media planning and placement, public relations, and other marketing activities), and may also provide tangible personal property (such as print advertisements, finished art, and video and audio productions).

(3) COMMERCIAL ARTISTS. Commercial artists, who may characterize themselves as commercial artists, commercial photographers, or designers, provide services and tangible personal property to their clients for use in their clients' advertising campaigns, or for their clients' other commercial endeavors such as sales of copies of finished art (including, e.g., photographic images) provided by a commercial artist. Services they provide to their clients include the creation and development of ideas, concepts, looks, or messages. Electronic artwork they provide may be transferred through remote telecommunications such as by modem or over the Internet, or by tangible means through electronic media such as compact or floppy disc. Tangible personal property they provide may include electronic media on which electronic artwork is transferred to the client, hard copies of the electronic artwork, hard copies of finished art (which may consist of photographic images).

(4) CONTRACT OF SALE. An agreement to transfer tangible personal property for consideration is a contract of sale. The client may, for example, issue a purchase order for the purchase of tangible personal property. The contract of sale for that tangible personal property consists of the terms of the purchase order together with the relevant terms of the master agreement (defined in subdivision (a)(10)).

(5) DIGITAL PRE-PRESS INSTRUCTION. Digital pre-press instruction is the creation of original information in electronic form by combining more than one computer program into specific instructions or information necessary to prepare and link files for electronic transmission for output to film, plate, or direct to press, which is then transferred on electronic media such as tape or compact disc.

(6) ELECTRONIC ARTWORK. Electronic artwork is artwork created through the use of computer hardware and software processes which results in artwork in a digital format that can

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be transmitted to others via electronic means (that is, transmitted through remote telecommunications such as by modem or over the Internet, or by electronic media such as compact or floppy disc). Elements of the process include the creation of original artwork or photographic images, scanning of artwork or photographic images, composition and design of text, insertion and manipulation of scanned and original electronic artwork, photographic images, and text. Electronic artwork does not include artwork that is transferred to clients in a tangible form, other than on electronic media, even where such artwork may have been manufactured or produced in whole or in part by computer hardware and software processes.

(7) FINISHED ART. Finished art is the final artwork used for actual reproduction by photomechanical or other processes, or used for display. It includes electronic artwork, illustrations (e.g. drawings, diagrams, halftones, or color images), photographic images, sculptures, paintings, and handlettering. Blueprints, diagrams, and instructions for signage furnished to a client as the result of environmental graphic design services are not finished art.

(8) HARD COPIES. An item is transferred on hard copy when it is transferred on any tangible personal property other than in digital format on electronic media. For example, finished art transferred on canvas or paper is transferred on hard copy while a transfer of finished art in digital format on compact or floppy disc is not regarded as a transfer on hard copy.

(9) INTERMEDIATE PRODUCTION AIDS. Intermediate production aids include items such as artwork, illustrations, photograph images, photo engravings, and other similar materials which are used to produce special printing aids or finished art.

(10) MASTER AGREEMENT. A master agreement is a contract, however characterized (such as “agency-client agreement”), entered into between an advertising agency or commercial artist and its client which specifies the obligations of each party to the master agreement with respect to their relationship, whether for a specified time or advertising campaign or until one of the parties terminates the agreement. A master agreement between an advertising agency and its client may specify the obligations of each with respect to the design of an advertising campaign for the client, the placement of the advertising with print and television media, and for the sale and purchase of tangible personal property related to the advertising campaign. There may then be additional terms for the purchase of specific tangible personal property during the advertising campaign, such as in a purchase order, which identifies the specific property that will be purchased and sold and the sales price for that property.

(11) PRELIMINARY ART. Preliminary art is tangible personal property which is prepared solely for the purpose of demonstrating an idea or message for acceptance by the client before a contract is entered into, or before approval is given, for preparation of finished art provided neither title to, nor permanent possession of, such tangible personal property passes to the client. Examples of preliminary art include roughs, visualizations, layouts, comprehensives, and instant photos.

(12) SPECIAL PRINTING AIDS. Special printing aids are reusable manufacturing aids which are used by a printer during the printing process and are of unique utility to a particular client.

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Special printing aids include electrotypes, stereotypes, photoengravings, silk screens, steel dies, cutting dies, lithographic plates, film, single or multi color separation negatives, and flats.

(13) THIRD PARTIES. A reference in this regulation to a transfer to a client also includes a transfer to a third party on the client's behalf. For example, the discussion in subdivision (b)(2)(B) for transfers of finished art by loading into the client's computer also includes transfers of the finished art by loading it into a third party's computer at the instruction of the client.

(b) APPLICATION OF TAX TO ACTIVITIES OF ADVERTISING AGENCIES AND COMMERCIAL ARTISTS.

(1) SERVICES.

(A) General.

1. Services performed to convey ideas, concepts, looks, or messages to a client may result in a transfer, enhancement, or revision of either electronic artwork, hard copies of electronic artwork, or copies of manually prepared artwork. If charges for such services are separately stated as "design charges," "preliminary art," "concept development," or any other designation that clearly indicates that the charges are for such services and not for finished art, they are nontaxable; however, tax applies if: (a) the master agreement or other contract provides that the advertising agency or commercial artist will pass to the client title or the right to permanent possession of the artwork in tangible form, such as on electronic media or hard copy, or (b) permanent possession of the artwork in tangible form is transferred to the client. If the master agreement provides that the client owns the concepts embodied in tangible personal property that is owned and possessed by the advertising agency or commercial artist (e.g., so that such concepts cannot be used on behalf of any other person), that contract provision does not constitute the passage of title to tangible personal property to the client. A requirement that an advertising agency or commercial artist retain permanent possession of the artwork in tangible form does not itself constitute a sale of that property to the client in the absence of a provision passing title to such property to the client.

2. Tangible personal property developed and used during services performed to convey ideas, concepts, looks, or messages is consumed in the performance of those services. Unless, prior to any use, the advertising agency or commercial artist passes title to such property to the client as discussed in the previous paragraph, the advertising agency or commercial artist is the consumer of such tangible personal property used and tax applies to the sale of property to, or to the use of the property by, the advertising agency or commercial artist. If the advertising agency or commercial artist passes title to, or permanent possession of, such tangible personal property to its client, tax applies to the sale of the tangible personal property by the advertising agency or commercial artist to the client.

(B) Digital Pre-Press Instruction. Digital pre-press instruction is a custom computer program under section 6010.9 of the Revenue and Taxation Code, the sale of which is not subject to tax, provided the digital pre-press instruction is prepared to the special order of the

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purchaser. Digital pre-press instruction shall not, however, be regarded as a custom computer program if it is a “canned” or prewritten computer program which is held or existing for general or repeated sale or lease, even if the digital pre-press instruction was initially developed on a custom basis or for in-house use. The sale of such canned or prewritten digital pre-press instruction in tangible form is a sale of tangible personal property, the retail sale of which is subject to tax.

(C) Retouching Photographic Images. Retouching a photographic image for the purpose of repairing or restoring the photograph to its original condition is a repair, the charge for which is not taxable.

(D) Signage. The creation and providing of single copies of blueprints, diagrams, and instructions for signage as a result of environmental graphic design is a service the charge for which is not taxable. Charges for additional copies are taxable.

(E) Websites. The design, editing, or hosting of an electronic website in which no tangible personal property is transferred to the client is a service, the charge for which is not subject to tax.

(F) Specific Nontaxable Charges. The following and similar fees and commissions are not taxable when they are separately stated. Whether separately stated or not, these fees and commissions are not included in the calculation of “direct labor” for purposes of subdivision (b)(3).

1. Media commissions or fees received for placement of advertising whether paid by the medium, by another advertising agency, or by the client.

2. Commissions or fees paid to advertising agencies by suppliers. Examples of such commissions are those paid to an advertising agency by a premium manufacturer (or distributor) or a direct-by-mail supplier.

3. Consultation and concept development fees related to client discussion, development of ideas, and other services. If the advertising agency transfers to the client tangible personal property produced as a result of these services, the transfer is incidental to the advertising agency’s providing of the service and is not a sale of that tangible personal property; the advertising agency is the consumer of tangible personal property transferred to the client incidental to the providing of a service.

4. Fees for research or account planning that entail consumer research and the application of that research to the client’s business or industry.

5. Fees for quality control supervision that entails the proofing and review of printing and other products provided by outside suppliers.

6. Charges for the formulation and writing of copy.

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(G) Example. A designer contracts to create and sell printed brochures to a law firm. The contract separately states a charge for design, for art direction, for preliminary art, and for the printed brochures. The designer's design and art direction services culminate in the creation of preliminary art that the designer uses to show the designer's concepts to the law firm. After the law firm approves the concepts, the designer finalizes the design of the brochure and contracts with a printer to print the brochures. The printer sells the printed brochures to the designer for resale, and the designer resells the printed brochures to the law firm. The only tangible personal property that will be transferred to the law firm (or to anyone on behalf of the law firm) are the printed brochures. The law firm will not obtain title to, or the right to possession of, any finished art or any other tangible personal property. Tax does not apply to the designer's separately stated charges for design, art direction, and preliminary art. Tax applies to the designer's separately stated charge to the law firm for the printed brochures.

(2) FINISHED ART.

(A) Use of Aids in Creation of Finished Art. If the advertising agency or commercial artist uses any intermediate production aids or special printing aids in the creation of the finished art, the presumptions with respect to passage of title and the calculation of the measure of tax on the sale of such aids by the advertising agency or commercial artist, is governed by the provisions of Regulation 1541 applicable to special printing aids.

(B) Transfers of Electronic Artwork. A transfer of electronic artwork in tangible form is a sale. However, a transfer of electronic artwork from an advertising agency or commercial artist to the client or to a third party on the client's behalf that is not in tangible form is not a sale of tangible personal property, and the charges for the transfer are not subject to tax. A transfer of electronic artwork is not in tangible form if the file containing the electronic artwork is transferred through remote telecommunications (such as by modem or over the Internet), or if the file is loaded into the client's computer by the advertising agency or commercial artist, and the client does not obtain title to or possession of any tangible personal property, such as electronic media or hard copy. If the transfer is not a transfer in tangible form because it is loaded onto the client's computer, the advertising agency or commercial artist should document that transfer by a written statement signed at the time of loading by the client and by the person who loaded the electronic artwork into the client's computer with the following or similar language: "This electronic artwork was loaded into the computer of [client's name] by [advertising agency's or commercial artist's name], and [advertising agency's or commercial artist's name] did not transfer any tangible personal property containing the artwork, such as electronic media or hard copies, to [client's name]." When such a statement is signed at the time the file is loaded, it will be rebuttably presumed that the transfer of electronic artwork was not transferred in tangible form. If there is no such timely completed statement, the advertising agency or commercial artist may provide other substantive evidence establishing that the artwork was not transferred in tangible form.

(C) Transfers of Finished Art in Tangible Form. The electronic or manual preparation of finished art for use in reproduction or display is not a service. Unless the transfer is not in

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tangible form as explained in subdivision (b)(2)(B), the transfer of finished art is a sale of tangible personal property and tax applies to charges for that finished art, including all charges for any rights sold with the finished art, such as copyrights or distribution and production rights, except as provided in subdivision (b)(2)(D)2.

1. Combined Charge for Finished Art and Conceptual Services. If charges for finished art are combined into a single charge that also includes nontaxable charges for conceptual services described in subdivision (b)(1)(A), the advertising agency or commercial artist may report the measure of tax on the retail sale of the finished art as specified in subdivision (b)(3), provided that the reported measure of tax must also include the value of reproduction rights included with the transfer except those that are not taxable as provided in subdivision (b)(2)(D)2.

2. Lump Sum Billing - 75/25 Presumption. If tax is not reported as provided in the previous paragraph, it will be rebuttably presumed that 75 percent of the combined charge for the finished art and conceptual services is for the nontaxable services and that 25 percent of the combined charge is the measure of tax on the retail sale of the finished art. However, if the sales price to the advertising agency or commercial artist of the finished art (or component parts) and any intermediate production aids or special printing aids sold to the client for that combined charge is more than 25 percent of the combined charge to the client, the measure of tax is the sales price of the tangible personal property to the advertising agency or commercial artist.

(D) Reproduction Rights Transferred With Finished Art.

1. Charges for the transfer of possession in tangible form to the client or to anyone else on the client's behalf of finished art for purposes of reproduction are included in the measure of tax on that sale, including all charges for the right to use that property, even though there is no transfer of title to the person reproducing the finished art, except as provided in subdivision (b)(2)(D)2.

2. Any agreement evidenced by a writing (such as a contract, invoice, or purchase order) that assigns or licenses a copyright interest in finished art for the purpose of reproducing and selling other property subject to the copyright interest is a technology transfer agreement, as explained further in Regulation 1507. Tax applies to amounts received for any tangible personal property transferred as part of a technology transfer agreement. Notwithstanding subdivision (b)(2)(C), tax does not apply to temporary transfers of computer storage media containing finished art transferred as part of a technology transfer agreement. Tax does not apply to amounts received for the assignment or licensing of a copyright interest as part of a technology transfer agreement. The measure of tax on the sale of finished art transferred by an advertising agency or commercial artist as part of a technology transfer agreement shall be:

a. The separately stated sales price if the finished art is permanently transferred, or the separately stated lease price if the finished art is temporarily transferred; provided that the separately stated price is reasonable;

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b. Where there is no such separately stated price, the separate price at which the person holding the copyright interest in the finished art has sold or leased that finished art or like finished art to an unrelated third party where: 1) the finished art was sold or leased without also transferring an interest in the copyright; or 2) the finished art was sold or leased in another transaction at a stated price satisfying the requirements of subdivisions (b)(2)(D)2.a.; or

c. If there is no such separately stated price under subdivision (b)(2)(D)2.a., nor a separate price under subdivision (b)(2)(D)2.b., 200 percent of the combined cost of materials and labor used to produce or acquire the finished art. “Cost of materials” consists of the costs of those materials used or incorporated into the finished art, or any tangible personal property transferred as part of the technology transfer agreement. “Labor” means any charges for labor used to create such tangible personal property where the advertising agency or commercial artist purchases such labor from a third party, or the work is performed by an employee of the advertising agency or commercial artist.

(3) SALES OF OTHER TANGIBLE PERSONAL PROPERTY BY ADVERTISING AGENCY OR COMMERCIAL ARTIST. Tax applies to the total charge for the retail sale of tangible personal property by an advertising agency or commercial artist. If an advertising agency or commercial artist combines charges for nontaxable services as defined in subdivision (b)(1)(F), such as media placement, with charges for tangible personal property for which the advertising agency or commercial artist is the retailer, the measure of tax on that retail sale of property includes the total of: direct labor; the cost of purchased items that become an ingredient or component part of the tangible personal property; the cost of any intermediate production aids or special printing aids; and a reasonable markup. Commissions, fees, and other charges exclusively related to the production or fabrication of tangible personal property are part of direct labor and are thus included in the measure of tax. Such charges include retouching of photographic images or other artwork for reproduction, provided the retouching is intended to improve the quality of the reproduction. An advertising agency or commercial artist must keep sufficient records to document the basis for the reported measure of tax.

(4) ITEMS PURCHASED BY AN ADVERTISING AGENCY OR COMMERCIAL ARTIST. Except when property is resold prior to any use, an advertising agency or commercial artist is the consumer of tangible personal property used in the operation of its business. Tax applies to the sale of such property to, or to the use of such property by, the advertising agency or commercial artist.

(c) SITUATIONS SPECIFIC TO ADVERTISING AGENCIES.

(1) ADVERTISING AGENCY ACTING AS AN AGENT FOR ITS CLIENT. An agent is one who represents another, called the principal, in dealings with third persons. (Civil Code section 2295.) To the extent that an advertising agency acts as the agent of its client when acquiring tangible personal property, it is neither a purchaser of the property with respect to the supplier nor a seller of the property with respect to its principal (that is, its client). Because of the unique relationship between advertising agencies and their clients, unless an advertising agency elects non-agent status under subdivision (c)(2)(A) or is otherwise the retailer of the property under

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subdivision (c)(2)(B) or (c)(2)(C), it is rebuttably presumed that the advertising agency acts as the agent of its client when acquiring tangible personal property on its client's behalf.

(A) A supplier of tangible personal property to an advertising agency is presumed to have made a retail sale of that property unless the supplier takes a timely and valid resale certificate in good faith from the advertising agency. Otherwise, the supplier has the burden of establishing that the advertising agency elected non-agent status under subdivision (c)(2)(A) and resold the property or that the advertising agency resold the property as the retailer under subdivision (c)(2)(B) or (c)(2)(C).

(B) When an advertising agency is the agent of its client for the purchase of tangible personal property under subdivision (c)(1), sales or use tax is due on the purchase price from the supplier to the advertising agency. Tax does not apply to the charge made by an advertising agency to its client for reimbursement, including tax reimbursement, for the amount charged by a supplier, nor does tax apply to the advertising agency's separately stated charges for its services directly related to its acquisition of such tangible personal property (e.g., when the advertising agency makes a separately itemized charge for reimbursement of the amount paid to the supplier of the property, tax does not apply to a separately itemized "agency fee"). When the applicable tax is use tax and the advertising agency does not pay that use tax to the supplier on the client's behalf, the advertising agency is liable for the use tax and must report and pay the use tax to the Board. The advertising agency's liability for that use tax is not extinguished unless the client has self-reported and paid the tax to the Board.

(C) An advertising agency may not issue a resale certificate when purchasing tangible personal property as the agent of its client. An advertising agency who issues a resale certificate to a supplier is presumed to be purchasing tangible personal property from that supplier on its own behalf for resale and not to be acting as an agent of its client. However, the advertising agency may provide evidence to prove that its issuance of the resale certificate was erroneous and that the advertising agency was acting as an agent of its client, provided the advertising agency has not treated the transaction as its own sale of tangible personal property to its client, collecting tax or tax reimbursement from its client on that sale. If the resale certificate was issued in error, the advertising agency is liable for use tax on the cost of tangible personal property purchased under the certificate unless the advertising agency has already paid that tax to the supplier or to the Board, or the client has self-reported and paid the tax to the Board.

(2) ADVERTISING AGENCY ACTING AS A RETAILER. An advertising agency that acts as a retailer of tangible personal property may issue a resale certificate for such tangible personal property if the property will be resold prior to any use. Absent an agreement that the property will be sold prior to use, tax is due on the purchase price of tangible personal property that is used prior to being resold to the client and, in addition, tax is also due on the sales price of the tangible personal property to the client.

(A) Election of Non-Agent Status. An advertising agency may elect non-agent status with respect to sales of tangible personal property to its client. This election must be supported by a specific written statement in its master agreement with the client. Alternatively, a statement may

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be included on an advertising agency's job order or invoice to its client. Statements should include the following or similar language: "(Advertising Agency's name) will not be acting as an agent of (client's name) for purposes of this transaction."

An advertising agency that elects non-agent status is a retailer with respect to tangible personal property sold to its clients. The measure of tax on the advertising agency's retail sale is the separately stated charge for the tangible personal property. If there is no such separately stated charge, the measure of tax is calculated as provided in subdivision (b).

(B) Items Produced or Fabricated by an Advertising Agency In-House. Advertising agencies are retailers of tangible personal property they produce or fabricate, e.g., by their own employees. Advertising agencies are not agents of their clients with respect to the acquisition of materials incorporated into such items of tangible personal property they produce or fabricate, but instead are the retailers of such property. The measure of tax on their retail sale of that property is the separately stated charge for the property sold. If there is no such separately stated charge, the measure of tax is calculated as provided in subdivision (b).

(C) Invoice to Client for More Than Cost of Tangible Personal Property to Advertising Agency. When an advertising agency invoices its client for tangible personal property provided by the advertising agency without separately stating the amount paid to the supplier for that property, the advertising agency is the retailer of the tangible personal property to its client. For example, when the advertising agency invoices a single charge to its client for tangible personal property that includes the amount paid to the supplier for the tangible personal property together with a markup, the advertising agency is the retailer of that tangible personal property and tax applies to that separately stated charge. If the advertising agency makes a combined charge to its client that includes the charge for the tangible personal property as well as the charge for any nontaxable services or reproduction rights under subdivision (b), the advertising agency is the retailer of the tangible personal property provided and the measure of tax on the sale of that tangible personal property is calculated as provided in subdivision (b).

(d) TRANSFERS BY AN ARTIST AT A SOCIAL GATHERING. The transfer of original drawings, sketches, illustrations, or paintings by an artist at a social gathering for entertainment purposes is not a sale or use or purchase of tangible personal property, and the artist is the consumer of any property so transferred, when all the following requirements are satisfied:

(1) Eighty percent or more of the drawings, sketches, illustrations, or paintings are delivered by the artist to a person or persons other than the purchaser;

(2) Eighty percent or more of all of the drawings, sketches, illustrations, or paintings are received by a person or persons, other than the purchaser, at no cost to the person or persons who become the owner of the drawings, sketches, illustrations, or paintings;

(3) The charge for the drawings, sketches, illustrations, or paintings is based on a preset fee; and

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(4) The preset fee charged for the drawings, sketches, illustrations, or paintings is contingent upon a minimum number of at least three drawings, sketches, illustrations, or paintings to be produced by the artist at the social gathering.

(e) CHARGES AND TRANSACTIONS GOVERNED BY OTHER REGULATIONS.

(1) AUDIO PRODUCTIONS. Tax applies to charges for an audio production obtained or furnished by an advertising agency to its client as provided in Regulation 1527.

(2) PHOTOGRAPHY. Tax applies to charges for photography as provided in Regulation 1528 except when the photographic image is furnished by a commercial artist as defined in subdivision (a)(3).

(3) PRINTED SALES MESSAGES. Qualifying sales of printed sales messages may qualify for exemption, as explained in Regulation 1541.5.

(4) TYPOGRAPHY. Tax applies to charges for typography or composed type obtained from outside suppliers as provided in Regulation 1541.

(5) VIDEO OR FILM PRODUCTIONS. When a video or film production obtained or furnished by an advertising agency to its client constitutes qualified production services as defined in Regulation 1529, tax applies to the charges for such qualified production services as provided in Regulation 1529.

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